82-1251

No. A-593

In the Supreme Court of the United States

October Term, 1982

RICHARD J. ROME,
Petitioner,

vs.

SUPREME COURT OF KANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. 10th CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Was it error for the 10th Circuit Court of Appeals of the United States to dismiss the Petitioner's appeal from a direct order of the United States District Judge, Luther B. Eubanks, dismissing his 42 U.S.C. 1983 complaint with prejudice on March 23, 1981, in Case Number 81-1084, Rome v. Supreme Court of Kansas, the U. S. District Court for the District of Kansas, as being moot under the circumstances herein?

Parenthetically, was the action of the Court below a denial of Petitioner's right to due process of law under the U. S. Constitution?

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No. A-593

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OPINIONS BELOW

The opinion of the 10th U. S. Circuit Court of Appeals is not reported but is set out in Appendix A. The order of said Court denying a motion for rehearing is also not reported but is set out in Appendix B. The order and opinion of the U. S. District Court for the District of Kansas is set out in Appendix C.

JURISDICTION

The opinion of the 10th U. S. Circuit Court of Appeals was filed on August 19, 1982. A timely motion for rehearing was filed on or about September 3, 1982. The order denying the motion for rehearing was entered on October 6, 1982. On or about December 30, 1982, an application for extension of time to file this Petition for a Writ of Certiorari was filed, and on January 4, 1983, U. S. Supreme Court Justice, Byron White, ordered an extension of time to file said Petition up to and including February 3, 1983.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1). The instant Petition for a Writ of Certiorari is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

> "No person shall . . . be deprived of life, liberty, or property, without due process of law;"

United States Constitution, Amendment XIV

> Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On February 10, 1981, the Supreme Court of Kansas entered an order removing petitioner from his position as Associate District Court Judge for alleged violations of

the Code of Judicial Conduct. Petitioner's motion for rehearing was denied by the Supreme Court of Kansas. Petitioner then filed this action under 42 U.S.C. 1983 in federal district court to enjoin removal and appointment of a successor pending disposition of his petition for writ of certiorari to the United States Supreme Court from the decision of the Kansas Supreme Court. On March 23, 1981, the district court dismissed the complaint with prejudice sua sponte, holding that it was improper for a federal court to intervene in state court disciplinary matters. Petitioner appealled to the 10th U.S. Circuit Court of Appeals.

After the filing of the appeal, this court denied Petitioner's petitions for writ of certiorari and for rehearing. The Respondent filed a motion to dismiss the appeal as moot pursuant to 10th Circuit Rule 9 in view of the Supreme Court's rulings. On August 19, 1982, the 10th Circuit dismissed the appeal as being moot. A petition for rehearing was denied on October 6, 1982. It is these two decisions as well as that of the district court that Petitioner seeks to have reviewed.

REASON WHY THE WRIT SHOULD BE GRANTED

THE 10TH CIRCUIT COURT OF APPEALS HAS DENIED THE PETITIONER'S RIGHT TO DUE PROCESS OF THE LAW BY DISMISSING HIS APPEAL BELOW, THEREBY GIVING ITS STAMP OF APPROVAL TO THE DISTRICT COURT'S APPLICATION OF THE DOCTRINE OF ABSTENTION IN DISMISSING THE COMPLAINT WITH PREJUDICE, WITHOUT NOTICE THEREOF, HEARING THEREON, OR OPPORTUNITY TO BE HEARD; IN EFFECT DENYING THE PETITIONER THE RIGHT TO EVER BRING A FURTHER ACTION UNDER 42 U.S.C. 1983.

ARGUMENT

The District Court below abused its discretion in summarily dismissing the Petitioner's Complaint. It further abused its discretion by dismissing the Complaint *with* prejudice. In a poorly written and disorganized opinion, the lower Court adds confusion to its digression. On Page 2 of said opinion the Court, "sua sponte", orders the Complaint "and all causes of action therein attempted to be stated dismissed". Then, in the final wrap-up of the opinion the Court dismisses the Complaint and simply *the* "cause of action therein stated".

To borrow from Judge Eubanks, "it is elementary" in American jurisprudence that all litigants have a right to be heard. They may not have a right to win their case or their point, but they certainly have a right to have their say. That doctrine is known as due process of the law. It is guaranteed to every citizen in the United States of America. It is extended to and applied to the individual States of the Union by the 14th Amendment to the U. S. Constitution. Simply stated it means every citizen involved in a legal controversy is entitled to fair notice of a hearing and he is entitled to a fair opportunity to be heard.

Reduced to complete simplicity, due process is nothing else but good old fashioned courtesy. Civilized people are, generally, and hopefully, courteous people. When judges don their traditional black robes, they don't cease to be people. Further, they don't cease being courteous.

Judges are supposed to apply the law in a case. In many instances that function allows a Court a certain amount of "discretion". Judicial discretion has been defined as "the sound choosing by the Court, subject to

the guidance of the law, between doing or not doing a thing, the doing of which cannot be demanded as an absolute right". *Chapman v. Dorsey*, 230 Minn. 279, 41 NW 2d 438, 16 ALR 2d 1015.

Applying the above definition to the case at hand, can it be said, fairly, that Judge Eubanks properly exercised his discretion? This writer thinks not. A serious and perfectly legitimate lawsuit has been filed in the U. S. District Court for the District of Kansas. All parties had been served. A motion for a temporary restraining order had been filed. Time was of the essence. All U.S. Judges in Kansas had recused themselves. Then, Judge Eubanks, "sua sponte", dismisses the entire proceeding without notice and without letting anyone be heard. With a single stroke of his pen, and in the silence and majesty of his taxpayer provided office, he adds to the damage by preventing the Petitioner from ever filing the "cause" or "causes" of action again.

It is the duty of Federal District Courts to adjudicate controversies legally before them. A narrow and extraordinary exception to this rule arises when those Federal District Courts decline to exercise or postpone the exercise of their jurisdiction in deference to State Courts. This doctrine is known as the "abstention doctrine". The Courts simply abstain from entering the fray. Abdication of the duty to adjudicate cases before a Court can be justified only in exceptional circumstances, or where such an order would *clearly* serve an important countervailing interest.

Judge Eubanks, below, justifies abdication of his sworn duty to adjudicate on Page 2 of his opinion where he dares not to "intervene into the actions of another court". He would emphatically not venture into the forbidden "area of state-federal judicial relations". Perhaps his choice of the placement of the two entities in the order he

did says something of his philosophy, which certainly goes to discretion. Judge Eubanks finds such a venture "especially" "intolerable" in the area of judicial disciplinary proceedings.

The lower Court cites *Del Rio v. Kavanagh*, 441 F. Supp. 220, as authority for abdication of his duty to adjudicate. Clearly, *Del Rio*, supra, is not in point. Petitioner has no quarrel with the reasoning of Judge Joiner in that opinion. However, it is simply not in point. In *Del Rio*, supra, the judge was found guilty by the judicial commission on February 28, 1977. *After* that finding and recommendation to the Supreme Court of Michigan, the judge commenced a lawsuit in the U. S. District Court. Petitioner agrees with the application of the abstention doctrine in these circumstances, because the judge therein had failed to exercise all of his state remedies. Under Michigan law he was entitled to a full hearing before the Michigan Supreme Court. He was entitled to file for a rehearing. Further, he was entitled to ask the State Court to stay the enforcement of the decree pending certiorari. The distinguishing factor between *Del Rio*, supra and the case at hand is, as stated above, that the Petitioner herein had exhausted all of his state remedies. He had no other place to go except to the U. S. District Court in Kansas under 42 U.S.C. 1983.

Judge Eubanks also cited *O'Neill v. Battisti*, 472 F. 2d 789, cert. denied, 411 U.S. 964, as authority for the application of the doctrine of abstention in judicial disciplinary proceedings. Again, the case is not in point. There, disciplinary action against the judge was in progress in the Ohio Supreme Court. He was suspended indefinitely from his duties as a judge and from practicing law. Before the Ohio Supreme Court heard the matters, the judge filed a lawsuit in the U. S. District Court in Ohio under

42 U.S.C. 1983. There, he was at least heard by the District Judge, obtaining a temporary restraining order. The Sixth Circuit issued a writ of mandamus vacating that order, and prohibited the District Court from further interfering in the Ohio disciplinary matters.

In *O'Neill*, supra, the Sixth Circuit Court of Appeals quoted from a temporary order of one of its judges staying order as follows:

> "the doctrine of abstention requires that the issues in this case which finds its roots in the judicial system of the State of Ohio *be first resolved* by the Ohio Supreme Court....." (Emphasis supplied).

Further, *O'Neill*, supra, quotes from a U. S. Supreme Court decision, *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297, 90 S. Ct. 1739, 1748, 26 L. Ed. 2d 234, as follows:

> "Any doubts as to the propriety of a federal injunction against State Court proceedings should be resolved in favor of *permitting* the *state courts to proceed in an orderly fashion to finally determine the controversy.* ...." (Emphasis supplied).

It is clear that the U. S. Supreme Court was interested in not interfering in an Ohio controversy while it was in progress in state court. No mention was made of what it would do if the State of Ohio had finally determined the matter.

The key in all of the cases cited by Judge Eubanks is the fact that state proceedings were in progress. Indeed, the U. S. Supreme Court, in *Atlantic*, supra, specifically said that "proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through

the state appellate courts and ultimately this Court." That is exactly what the Petitioner was doing in the case at bar. All possible state remedies had been exhausted. His rights, in his opinion, had been violated by the Respondent in view of the U. S. Supreme Court's decision in *In Re Ruffalo*, 88 S. Ct. 1222, 30 L. Ed. 2d 117, and other constitutional grounds. He was at the very beginning of his time to file a petition in the U. S. Supreme Court for a writ of certiorari. His salary was stopped. His health insurance, and that of his family, was stopped. His retirement program was stopped. A new judge was in the process of being appointed to replace him.

42 U.S.C. 1983 gave the Petitioner a cause of action against the Respondent. It was the duty of the U. S. District Court to adjudicate that lawsuit. The Petitioner only asked the District Court to maintain the status quo until his petition for a writ of certiorari was filed and acted upon by the U. S. Supreme Court. Generally, abstention is not favored in actions brought under 42 U.S.C. 1983. *Bergman v. Stein*, 404 F. Supp. 287, and abstention is not appropriate when a suit is not frivolous, *Zurek v. Woodbury*, 446 F. Supp. 1149.

In the landmark case of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, the doctrine of abstention is thoroughly exhausted. Even there, the *judicial exception* to our long-standing, statutorily-evidenced policy of permitting state courts to try state cases free from interference by federal courts, is discussed. That exception occurs where a person about to be prosecuted in state court can show that he will, if the proceeding in state court is not enjoined, suffer irreparable damage. See *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22. See also the excellent dissenting opinion of the late Justice William O. Douglas in *Younger*, supra, at 91 S. Ct. 760.

All of the matters discussed in the above paragraph concerned criminal matters. Also, they concerned pending state cases. The case of Petitioner is not criminal as such, but it is certainly "quasi-criminal", see *Ruffalo*, supra. Also, it is not a pending state case. Irreparable damage was alleged in the Complaint. Certainly those factors would have warranted federal intervention, especially at the stage these proceedings presented themselves. Usually it is the pendency of a state proceeding rather than the nature of the initial forum that makes federal interference in state proceedings untenable. See: *Salem Inn, Inc. v. Frank*, 433 F. Supp. 183. The District Judge in the case at bar certainly had the authority to hear the case. See also the following cases discussing abstention, the Civil Rights Act, and attorneys and judges: *Polk v. State Bar of Texas*, 480 F. 2d 998 (abstention inappropriate); *DeVita v. Sills*, 422 F. 2d 1172, where the court held that the District Court had jurisdiction by virtue of 42 U.S.C. 1983 (pg. 1176); again, in *Devlin v. Sosbe*, 465 F. 2d 169, the Seventh Circuit says that abstention is not to be encouraged in 1983 cases; see *Lenske v. Sercombe*, 491 F. 2d 521, where the Ninth Circuit discusses the possibility of 42 U.S.C. 1983 being an exception to 28 U.S.C. 2283, and recognizing the exception set out in *Dombrowski*, supra.

The decision of the Circuit Court in dismissing the Petitioner's appeal as being moot is erroneous, unjust, unfair, and an abuse of judicial discretion. In the first instance, it misstates the series of judicial events in the matters below. The Petitioner gave notice of his intent to petition the United States Supreme Court for a writ of certiorari, made two requests to the Respondent to stay enforcement of its ruling, and had a motion for rehearing denied by the Respondent, all *prior* to filing his Complaint in the U. S. District Court on March 6, 1981. The state remedies had been completely exhausted at that point.

Secondly, the decision lends credence to Judge Eubanks' "dodging of the bullet" in invoking the abstention doctrine and his daring not to venture into the forbidden "area of state-federal judicial relations". It is *clear* that he was not venturing into an ongoing state matter. It was all over in the state court.

This Court "unanimously determined" that oral argument would not have been of material assistance to them and cited the appropriate rule. Petitioner realizes the tremendous case load this important tribunal has. However, could it not have at least allowed this Petitioner the simple courtesy of taking two or three days from his practice to travel some six hundred miles and then orally present his argument to them? Is this too much to ask of such an important Court? This Petitioner has spent literally thousands of dollars and spent an equal amount of time on this case without even seeing *one* judge! He has lost his position as a judge, lost his income, lost his retirement, lost his insurance, suffered humiliation and rejection. All he asks is an opportunity to be heard.

A general rule is cited by the Court in dismissing Petitioner's appeal as follows:

> "Generally an appeal will be dismissed as moot when events occur during the pendency of the appeal which prevent the appellate court from granting the requested relief."

In support of this general rule the Court cites three cases as authority therefor:

In re Cantwell, 639 F. 2d 1050;

In re Combined Metals Reductions Co., 557 F. 2d 179;

and

Alton & So. Ry. Co. v. I.A.M. & A.W., 463 F. 2d 872.

What the Court failed to do was to recite the added key words in each of the decisions. In *Cantwell*, supra, the 3rd Circuit, in 1981, cited the general rule, but added the important wording which states that an appeal will be dismissed as moot when the appellate court is prevented "from granting *any effective relief.*" (Emphasis supplied).

The 9th Circuit, in *Combined Metals*, supra, in 1977, also adds the words to the general rule: . . . . . "which prevents the appellate court from granting *any effective relief*, ..." (Emphasis supplied).

The D. C. Circuit, in *Alton & So. Ry.*, supra, in 1972, and cited by this Court, is even stronger when it enforces the general rule when the events "have *eliminated any possibility that the court's order may grant meaningful relief* affecting the controversy that precipitated the litigation, . . ." Further, the Court in *Alton*, supra, goes on to say that "a court may continue an appeal in existence, notwithstanding the lapse in time of the particular decree or controversy, when the court discerns a likelihood of recurrence of the same issue, generally in the frameworks of a 'continuing' or 'recurring' controversy, and 'public interest' in maintaining the appeal."

The key case, and "the seminal opinion, in modern jurisprudence is" *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 31 S. Ct. 279, 55 L. Ed. 310 (1911). There, the court noted the general rule calling for dismissal of an appeal if during its pendency something occurs which precludes *effectual relief* to the appealing party. *However, it held the rule inapplicable*, as follows:

> "In the case at bar the order of the Commission may to some extent. . . . . be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the I.C.C. are usually

> continuing . . . ., and these considerations ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers have their rights determined by the Commission without a chance of redress."

Key elements of the *Southern Pacific Terminal*, supra, case are: the likelihood of repetition of the controversy and the public interest in assuring appellate review.

In the case at bar, there is very definitely the likelihood of repetition of the controversy. The civil rights of the Petitioner are alleged to have been violated by the Respondent. The controversy is the subject matter of a 42 U.S.C. 1983 case. No review of the actions of the Petitioner has been made by any tribunal. The statute of limitations is two years under Kansas law, and this will not expire until March of 1983. Therefore, the case can be filed in the U. S. District Court anytime before then.

Also, in the case at bar, there is present the necessary element of public assurance of appellate review. If the decision of Judge Eubanks is allowed to stand, the effect may be the denial of appellate review for the Petitioner. Judge Eubanks dismissed the case below *with* prejudice. This means it cannot be refiled or amended. It becomes, in effect, res judicata. Therefore, the invocation by the Court of the general rule as to dismissal of an appeal because of mootness, denies appellate review of his decision and allows him to avoid and evade review. This flies in the face of the vitality of the undeniable doctrine pronounced by the highest Court in the land in *Southern Pacific Terminal*, supra.

CONCLUSION

For the reasons and arguments stated herein the Petitioner respectfully requests that a writ of certiorari issue to the 10th U. S. Circuit Court of Appeals, to review that Court's decision which ordered the Petitioner's appeal from the U. S. District Court dismissed, thereby denying said Petitioner his constitutional right to due process of law.

Respectfully submitted,

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APPENDIX

APPENDIX A

SEPTEMBER TERM—October 6, 1982

Before Honorable James E. Barrett, Honorable Delmas C. Hill and Honorable Monroe G. McKay, Circuit Judges, United States Court of Appeals

No. 81-1410

RICHARD J. ROME,
Plaintiff-Appellant,

v.

THE SUPREME COURT OF KANSAS,
Defendant-Appellee.

This matter comes on for consideration of appellant's petition for rehearing which we construe as a motion to recall the mandate. On consideration whereof, we conclude that appellant has failed to raise any argument not previously considered by this court. Accordingly, appellant's petition for rehearing is denied.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

APPENDIX B

(Filed August 19, 1982)

NOT FOR ROUTINE PUBLICATION
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 81-1410

RICHARD J. ROME,
Plaintiff-Appellant,

v.

THE SUPREME COURT OF KANSAS,
Defendant-Appellee.

Appeal from the United States District Court
For the District of Kansas
(D. C. No. 81-1084)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Richard J. Rome, pro se.

Robert T. Stephan, Attorney General, and Bruce E. Miller, Deputy Attorney General, the State of Kansas, Topeka, Kansas, for Defendant-Appellee.

Before BARRETT, HILL and McKAY, Circuit Judges.

PER CURRIAM.

This three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R.App.P. 34(a);

Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

Plaintiff appeals the order of the district court dismissing his request for temporary injunctive relief pending review by the United States Supreme Court. Defendant has filed a motion to dismiss the appeal as moot.

On February 10, 1981, the Supreme Court of Kansas entered an order removing Plaintiff from his position as Associate District Court Judge for violations of the Code of Judicial Conduct. Plaintiff's motion for rehearing was denied by the Supreme Court of Kansas. Plaintiff then brought this action in federal district court to enjoin removal and appointment of a successor pending disposition of his petition for writ of certiorari to the United States Supreme Court from the decision of the Kansas Supreme Court. On March 23, 1981, the district court dismissed the complaint sua sponte holding that it was improper for a federal court to intervene in state court disciplinary matters. Plaintiff appealed.

Subsequent to the filing of this appeal, the United States Supreme Court denied plaintiff's petitions for writ of certiorari and for rehearing. Defendant filed a motion to dismiss the appeal as moot pursuant to Tenth Circuit R. 9 in view of the Supreme Court's rulings.

Generally an appeal will be dismissed as moot when events occur during the pendency of the appeal which prevent the appellate court from granting the requested relief. *In re* Cantwell, 639 F.2d 1050, 1053 (3d Cir. 1981); *In re* Combined Metals Reduction Co., 557 F.2d 179, 187 (9th Cir. 1977); Alton & Southern Railway Co. v. International Association of Machinists & Aerospace Workers, 463 F.2d 872, 877-78 (D.C. Cir. 1972). In his complaint, plaintiff sought only a temporary injunction against en-

forcement of the Kansas Supreme Court's order of removal pending a decision on his petition for writ of certiorari by the United States Supreme Court. The decisions of the United States Supreme Court denying certiorari and rehearing clearly render this appeal moot, since there is no longer any basis for granting the requested temporary injunctive relief. We reject plaintiff's argument that the request for attorneys' fees contained in his complaint prevents this appeal from being moot. Since plaintiff is not a prevailing party within the meaning of 42 U.S.C. § 1988, he is not entitled to attorneys' fees. Furthermore, we reject plaintiff's characterization of his residuary prayer for "any further monetary . . . relief as may seem just and equitable" as a prayer for damages which would prevent this appeal from being moot. Accordingly, defendant's motion to dismiss this appeal is granted.

APPEAL DISMISSED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Civil Action No. 81-1084

RICHARD J. ROME,
Plaintiff,

vs.

THE SUPREME COURT OF KANSAS,
Defendant.

ORDER OF DISMISSAL WITH PREJUDICE

(Filed March 23, 1981)

On March 5, 1981, the plaintiff, Richard J. Rome, filed herein a voluminous, rambling and self-serving complaint against the Supreme Court of the State of Kansas, wherein he seeks to enjoin said court from enforcing an order entered by it on February 10, 1981, in a case styled State v. Rome, 52,241. The order sought to be stayed or enjoined directed that the plaintiff Rome be "forthwith" removed from his position as Associate District Court Judge of the Twenty-Seventh Judicial District of the State of Kansas, Position I, Hutchinson, Kansas. Said order of the Supreme Court of the State of Kansas, it is alleged, upheld and ratified a recommendation entered by a duly constituted commission which was properly empaneled and acting pursuant to the judicial disciplinary powers conferred upon it by the Constitution of the State of Kansas. Plaintiff alleges that his constitutional rights have been violated and that he seeks and is in the process of preparing

a petition for writ of certiorari to the Supreme Court of the United States, but desires that the order of the Supreme Court of the State of Kansas be stayed pending the efforts of plaintiff to obtain a review of same by the highest court in the United States.

The Chief Judge of the Court of Appeals for the Tenth Circuit has assigned me to hold court in the State of Kansas for the purpose of hearing this matter, and the Clerk of the United States District Court for the District of Kansas in Wichita has forwarded me a copy of the complaint, which has been studied in detail. Now, being advised in the premises, the court does hereby, sua sponte, order the complaint herein and all causes of action therein attempted to be stated dismissed.

It is elementary that one court should not intervene into the actions of another court excepting in those rare instances where supervisory control is specifically mandated by law. Certainly, in the area of state-federal judicial relations the intrusion of one court into the proper functions of the other is intolerable, and this is especially so with respect to judicial disciplinary proceedings. In holding that a federal court should abstain from intervening in a state court disciplinary matter, Judge Joiner said:

> Surely, it appears to this Court, an . . . important and core interest of a state's judicial system is the procedure and mechanism it has adopted for policing and enforcing standards of judicial conduct of its judges. This Court can think of no more sensitive and important interest of the state's judicial system than that of assuring the integrity of the state bench. Therefore, this is clearly the type of case where this Court should exercise equitable restraint and require

the plaintiff to pursue his remedies in the state courts. (*Del Rio v. Kavanagh*, 441 F.Supp. 220.)

If it be urged that the doctrine of abstention is inapplicable here since the state court has completed its hearings, I simply say that the issuing of a stay of the final judgment of the Kansas Supreme Court is at least as significant an intrusion into state matters as would be the enjoining of the prosecution of disciplinary proceedings prior to judgment.

The Court of Appeals for the Sixth Circuit has spoken directly to the question presented here, and in *O'Neill v. Battisti*, 472 F.2d 789, cert. denied, 411 U.S. 964, held that the United States District Court for the District of Ohio should not interfere in any way with disciplinary proceedings in the Supreme Court of the State of Ohio, which disciplinary proceedings were instituted to remove a judge from presiding over the Court of Common Pleas of Hamilton County. Therein the court quoted from the body of the opinion in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, as follows:

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

If the plaintiff has been unlawfully deprived of his civil rights and if the challenged order should properly be stayed such relief must come from either the Supreme Court of Kansas or of the United States. It would be inexcusable meddling for this district court to enter into the controversy.

For all of the foregoing reasons, the complaint herein and cause of action therein stated are hereby dismissed with prejudice.

The Clerk of the Court is directed to mail a copy hereof to plaintiff's counsel and to the Clerk of the Supreme Court of the State of Kansas.

DATED this 20th day of March, 1981.

/s/ Luther B. Eubanks
United States District Judge

82-1251

A-593

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RICHARD J. ROME,
Petitioner,

v.

SUPREME COURT OF KANSAS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February, 1983

QUESTION PRESENTED FOR REVIEW

Is An Action Moot Under Circumstances Where No Court Could Possibly Grant The Relief Requested By The Petitioner?

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OPINIONS BELOW

There are two opinions below in this action. The Honorable Luther B. Eubanks, United States District Court Judge, filed his Order of Dismissal with Prejudice in this action on March 23, 1981. A copy of that Order is attached as Appendix C to Petitioner's Petition for a Writ of Certiorari. The other opinion was filed August 19, 1982, by the Tenth Circuit Court of Appeals dismissing Petitioner's appeal to that Court as moot. A copy of that Opinion is attached as Appendix B to Petitioner's Petition for a Writ of Certiorari.

There are two other opinions connected to this action which Petitioner failed to bring to the Court's attention. Those opinions are of the Kansas Supreme Court in Kansas, ex rel. Commission on Judicial Qualifications v. Rome, 229 Kan. 195, 623 P.2d 1307 (1981) cert. denied

sub. nom. Rome v. Kansas, 454 U.S. 830 (1981) reh. denied 454 U.S. 1094 (1981), and In Re Rome, 218 Kan. 198, 542 P.2d 676 (1975).

STATEMENT OF CASE

On February 10, 1981, the Kansas Supreme Court, upon a finding that Petitioner, then a Kansas associate district judge, had violated Canons 1, 2, 3A(1), 3A(3), and 3A(6) of the Code of Judicial Conduct, ordered Petitioner removed from office, forthwith. Kansas, ex rel. Commission on Judicial Qualifications v. Rome, supra.

On March 5, 1981, Petitioner filed a "voluminous, rambling and self-serving complaint against the Supreme Court of the State of Kansas" in which his only requested relief, other than attorney fees, was stated by Petitioner to be:

> 1. This is a civil action for temporary injunctive relief on behalf of the Plaintiff against the Defendant, pending the filing and hearing of a petition for a writ of certiorari to The United States Supreme Court by the Plaintiff for review of a decision by Defendant against said plaintiff, removing

him from the office of Associate District Court Judge of the 27th Kansas Judicial District, Position I, on February 10, 1981.

2. Pending the filing by and hearing of the Plaintiff's petition for a writ of certiorari to The Supreme Court of the United States for a review of Defendant's decision against him in the State case referred to above, stay or enjoin the Defendant from implementing or enforcing it's order of removal, dated February 10, 1981, and the denial of the order for rehearing, dated March 2, 1981, including the convening of the 27th Kansas Judicial District Nominating Commission to select or appoint a successor to Plaintiff's former office, or to otherwise change the status quo of the situation existing prior to 8:30 A.M., February 10, 1981, in regard to said plaintiff. [See ¶¶1 and 2 of Respondent's Complaint in Case No. 81-1084 as filed in the United States District Court , Wichita, Kansas, on March 5, 1981.]

The District Court, exercising its discretion, implemented the doctrine of abstension and dismissed the action on March 23, 1981. See Appendix C, Respondent's Petition for Writ of Certiorari to the United States Supreme Court. See also, Younger v. Harris, 401

U.S. 37 (1971) and especially, Middlesex County Ethics Comm. v. Garden State Bar Ass'n., ___ U.S. ___, 102 S.Ct. 2515 (1982). For a similar case arising out of this District, please see State v. Phelps, 226 Kan. 371, 598 P.2d 180 (1979) cert. denied 444 U.S. 1045 (1980) and Phelps v. Kansas Supreme Court, 662 F.2d 649 (10th Cir. 1981) cert. denied, ___ U.S. ___, 102 S.Ct. 2009 (1982) reh. denied ___ U.S. ___, 102 S.Ct. 2917 (1982).

The District Court dismissal was appealed by Petitioner to the Tenth Circuit Court of Appeals on or about April 6, 1981, where it remained until its dismissal on August 19, 1982.

In the meantime, Petitioner did file in this Court for a writ of certiorari to the Kansas Supreme Court from its judgment in Kansas, ex rel. Commission on

Judicial Qualifications v. Rome, supra. On October 5, 1981, this Court denied certiorari. 454 U.S. 830 (1981) and later denied Petitioner's motion for rehearing, 454 U.S. 1094 (1981). Since Petitioner's only requested relief in this action was for a temporary injunction to allow this Court to consider the allegations raised in his petition for a writ of certiorari, this entire case became moot on November 30, 1981, when this Court denied Petitioner's motion for rehearing.

Respondent moved to dismiss the instant action on May 6, 1982, because, as explained above, the case was moot. The Tenth Circuit Court of Appeals granted Respondent's motion on August 19, 1982. See Appendix B of Petitioner's Petition for Writ of Certiorari. From that order, Petitioner seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

1. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DID NOT HAVE SUBJECT MATTER JURISDICTION IN THE FIRST INSTANCE IN THIS CASE.

While the District Court properly dismissed this action under the doctrine of abstension, pursuant to Younger v. Harris, supra, Middlesex County Ethics Comm. v. Garden State Bar Ass'n., supra, and Phelps v. Kansas Supreme Court, supra, it probably did not have subject matter jurisdiction in the first place.

This Court and many federal courts have held on numerous occasions that lower federal courts do not have subject matter jurisdiction to review state disbarment proceedings had before state courts, even though the state court proceedings are alleged to have been constitutionally deficient. Selling v. Radford, 243 U.S. 46 (1917); Theard v.

U.S., 354 U.S. 278 (1957); Schware v. Board of Bar Examinations of New Mexico, 353 U.S. 1232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962); Mayes v. Honn, 542 F.2d 822 (10th Cir. 1976); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976); MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969) cert. denied 396 U.S. 960 (1969); Ginger v. Circuit Court for County of Wayne, 372 F.2d 621 (6th Cir. 1967) cert. denied 387 U.S. 935 (1967); Feldman v. State Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971); Jones v. Hulse, 391 F.2d 198 (8th Cir. 1968) cert. denied 393 U.S. 889 (1968); In Re MacNeil, 266 F.2d 167 (1st Cir. 1959); Clark v. State of Washington, 366 F.2d 678 (9th Cir. 1966); Lenske v. Sercombe, 266 F.Supp. 609 (D.C. Ore. 1967) aff'd., 401 F.2d 520 (9th Cir.

1968); Turner v. American Bar Association, 407 F.Supp. 451 (W.D. Wis., 1975); Diehl v. United States, 438 F.2d 705 (5th Cir. 1971) cert. denied 404 U.S. 830 (1971); Polk v. State Bar of Texas, 480 F.2d 998 (5th Cir. 1973); Saier v. State Bar of Michigan, 293 F.2d 756 (6th Cir. 1961); Mildner v. Gulotta, 405 F.Supp. 182 (E.D. N.Y. 1975); Tang v. Appellate Division, 487 F.2d 138 (2d Cir. 1973) cert. denied, 416 U.S. 906 (1974); Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (6th Cir. 1970); Getty v. Reed and Collis v. Reed, cons'd, 547 F.2d 971 (6th Cir. 1977); Niles v. Lowe, 407 F.Supp. 132 (D.C. Ha. 1976); and Phelps v. Kansas Supreme Court, supra.

This fundamental law is not changed by labeling the cause as a "civil rights" action, nor is it changed simply because this case involves the disciplining of a

judge as opposed to an attorney. In fact, the reasons are even stronger for the federal courts to stay out of such state judicial administration.

Petitioner neither here nor below has ever established that any federal court has jurisdiction over the subject matter of this action.

2. THIS COURT SHOULD NOT REVIEW THIS ACTION BECAUSE PETITIONER HAS PREVIOUSLY RAISED HIS SUBSTANTIVE ISSUES AND HAD THEM DETERMINED BY THE KANSAS SUPREME COURT AND THIS COURT.

Petitioner does not raise any issue in this action which has not been previously considered by the Kansas Supreme Court and by this Court in Kansas, ex rel. Commission on Judicial Qualifications v. Rome, 229 Kan. 195, 623 P.2d 1307 (1981) cert. denied sub. nom. Rome v. Kansas, 454 U.S. 830 (1981) reh. denied 454 U.S. 1094 (1981).

Petitioner has not been "wronged" by anyone throughout these proceedings, and a further waste of judicial time should not be allowed by this Court.

3. THERE ARE NO DECISIONAL CONFLICTS BETWEEN THIS COURT AND THE CIRCUIT COURTS OF APPEALS OR STATE COURT DECISIONS.

Petitioner never cites any decisional conflict between this case below and any other court opinion. Respondent can find none.

Without a decisional conflict, this Court should deny the petition for a writ of certiorari because it raises no issue about which there is a conflict or any indecision on the part of lower courts.

4. PETITIONER HAS NOT PRESENTED AN ISSUE OF NATIONAL IMPORTANCE, NOR HAS HE PRESENTED AN IMPORTANT FEDERAL QUESTION.

Petitioners seeking a writ of certiorari from this Court have an

obligation to demonstrate that there are special and important reasons for granting the writ of certiorari. It is not a remedy for achieving "individual justice in individual cases." Wright, Miller, Cooper and Grossman, Federal Practice and Procedure, Jurisdiction §4004.

It is Petitioner's burden to show he is presenting an important question of federal law or an issue of national importance. He has totally failed to do either in his petition.

The only real issue raised in this case is whether a state supreme court may, under adequate substantive and procedural law, issue a ruling with finality in its own jurisdiction as to who may sit as a judge on one of its lower state courts. Respondent respectfully submits that a state supreme court is in a much better

position than this Court to judge the ethics of a judge in its jurisdiction and to determine who is worthy to be a Kansas associate district court judge.

The Kansas Supreme Court has found Petitioner to be unfit to be a Kansas judge, a finding which should not be disturbed by this Court.

5. THIS ACTION IS MOOT BECAUSE THE ONLY RELIEF EVER REQUESTED BY PETITIONER CANNOT NOW BE GRANTED BY THIS COURT OR BY ANY COURT.

Black's Law Dictionary, (5th ed. 1979), p. 909, defines when a case is moot by stating:

> A case is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Leonhart v. McCormick, D.C.Pa., 395 F.Supp. 1073, 1076. Question is "moot" when it presents no actual controversy or where the issues have ceased to exist. Matter of Lawson's Estate, 41 Ill.App.3d 37, 353 N.E.2d 345, 347.

> Generally, an action is considered "moot" when it no longer presents a justiciable controversy because issues involved have become academic or dead. Sigma Chi Fraternity v. Regents of University of Colo., D.C.Colo., 258 F.Supp. 515, 523. Case in which the matter in dispute has already been resolved and hence, one not entitled to judicial intervention unless the issue is a recurring one and likely to be raised again between the parties, Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1.

As explained in the Statement of Case, Petitioner's ONLY requested relief was for a temporary injunction staying the Kansas Supreme Court's order removing Petitioner from the office of Associate District Judge of Reno County, Kansas, until Petitioner could seek review of that order before this Court.

Petitioner did, years ago, seek that review and this Court, on October 5, 1981, denied Petitioner's petition for a writ of certiorari in Rome v. Kansas, 454 U.S. 830 (1981), reh. denied 454 U.S. 1094 (1981).

No court, nor any other body, could possibly grant Petitioner's requested relief at this time. Petitioner's cause of action is moot and his continued prosecution of this case possibly violates the intent of 28 U.S.C. §1927 and DR 7-102(A)(2) of the A.B.A. Code of Professional Responsibility.

CONCLUSION

The Tenth Circuit Court of Appeals reached the correct result when it found this action to be moot. That decision for the reasons stated above should not be reviewed by this Court. Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, BRUCE E. MILLER, a member of the Bar of this Court and counsel of record for Respondent herein, hereby certifies that on the 18th day of February, 1983, he caused to be served the foregoing Brief in Opposition to the Petition for Writ of Certiorari, together with Respondent's Appendices A, B, and C, on Petitioner in this appeal, by mailing three (3) copies thereof by ordinary mail, postage prepaid, addressed to:

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